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TAN TIANG HUAT & ANOR v. LIM YEE HUI & ANOR

HIGH COURT MALAYA, PULAU PINANG
ANAND PONNUDURAI J
[CIVIL SUIT NO: PA-22NCVC-18-02-2024]
12 JULY 2024

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Abstract – *In a transfer application pursuant to O. 57 r. 1(4) of the Rules of Court 2012, the cause of action that ought to be considered as a predominant cause of action is the one that arose in an original statement of claim, and not one that arose in a counterclaim.*

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CIVIL PROCEDURE: *Courts – Transfer of action – From one High Court to another – Application to transfer trial of suit from Penang High Court to Kuala Lumpur High Court – Whether transfer application ought to be allowed – Whether cause of action arose in Penang or Kuala Lumpur – Whether cause of action that arose in original statement of claim, and not in counterclaim, that ought to be considered as predominant cause of action – Whether jurisdiction to hear suit fell to court where leave order was granted – Rules of Court 2012, O. 57 r. 1(4)*

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The second plaintiff was a company which operated a café named 'BeAngels Specialty Coffee' ('BeAngels') located in Penang. The first plaintiff and the first and second defendants were the shareholders of the second plaintiff, who respectively owned 51%, 20% and 9% of its shares. The dispute between the parties started when the first plaintiff discovered that the defendants had established a sole proprietorship under the name 'Lokal Bakery Resources', which in turn operated a café called 'BeanGood' in Kuala Lumpur. In operating the said café, the first plaintiff contended that the defendants had: (i) conspired to injure the plaintiffs; (ii) solicited the staffs of BeAngels to work with BeanGood; (iii) misappropriated the trade secrets of BeAngels and misused its social media platforms to promote the products of BeanGood; and (iv) committed the tort of passing off as the cursive font used for BeanGood's logo was similar to that used by BeAngels and the design and marketing style employed by BeanGood was also similar to that used by BeAngels. Based on these contentions, the plaintiffs commenced a derivate action against the defendants. The said derivative action under ss. 347 and 348 of the Companies Act 2016 was filed pursuant to an *ex parte* order obtained by the plaintiffs at the Penang High Court. In resisting the derivative action, other than filing their defence, the defendants also filed a counterclaim against the first plaintiff and his daughter for conspiracy to injure the first defendant as well as minority oppression. Afterwards, the first defendant filed an application to transfer the present suit, which was heard in the Penang High Court, to the Kuala Lumpur High Court. As claimed by the defendants, the present suit ought to be transferred because: (i) the

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plaintiffs' cause of action against the first defendant arose in Kuala Lumpur; (ii) both defendants resided in Kuala Lumpur; and (iii) the *forum conveniens* was in favour of the defendants and it would avoid the defendants from incurring higher costs during the trial of the present suit.

Held (allowing application):

(1) The starting point must be the original statement of claim filed by the plaintiffs. That should be the predominant cause of action that ought to be considered in a transfer application as the counterclaim was merely one that was brought in response to the original statement of claim. The plaintiffs' claim centred around the defendants setting up a rival business in Kuala Lumpur. The plaintiffs' allegations pertaining to the poaching of staffs, the defendants' committing of the tort of passing off, misappropriation of trade secrets and plaintiffs' property, all were related to the establishment of BeanGood in Kuala Lumpur. Therefore, there were certainly merits in the defendants' submission that the predominant cause of action arose or occurred in Kuala Lumpur. (paras 23-26)

(2) It was argued by the plaintiffs that since the leave to commence the derivative action was granted by the Penang High Court, the same was cloaked with the territorial jurisdiction and/or the said court was the proper forum to hear the case. This court disagreed. The defendants were totally unaware with the leave application. The plaintiffs had obtained the leave order on an *ex parte* basis without serving the same to the defendants. Leave applications for derivative actions should be heard *inter partes* as it would normally be heavily contested. There was uncertainty as to how the plaintiffs obtained the leave order. Nonetheless, considering that the leave order was obtained *ex parte*, it cannot now be relied upon by the plaintiffs to contend that the Penang High Court was cloaked with the jurisdiction to hear the present suit. (paras 28-30)

Case(s) referred to:

Ahmad Amryn Abd Malek & Ors v. Bursa Malaysia Securities Bhd [2021] 2 CLJ 222 HC ***(refd)***

Chow Siew Hon v. Lee Tian Hock & Anor [2016] CLJU 662; [2016] 1 LNS 662 HC ***(refd)***

Low Long Yoong & Anor v. Low Kok Choon & Anor [2014] 4 CLJ 577 HC ***(refd)***

Ops Suria (EM) Sdn Bhd v. Ayuda Engineering Services Enterprise Sdn Bhd [2012] 4 CLJ 670 HC ***(refd)***

Posc Ti Sdn Bhd v Kerajaan Negeri Terengganu & Anor [2015] CLJU 1416; [2015] 1 LNS 1416 HC ***(refd)***

Tenaga Nasional Bhd v. Advanced Medical Products Sdn Bhd [2018] CLJU 884; [2018] 1 LNS 884 HC ***(refd)***

Vincent Danial lwn. Rani M Doraisamy [2009] CLJU 961; [2009] 1 LNS 961 HC ***(refd)***

Legislation referred to:
Companies Act 2016, ss. 347, 348
Courts of Judicature Act 1964, s. 23(1)
Rules of Court 2012, O. 57 r. 1(4)

For the plaintiffs - Ng Siok Lyn & Quah Zhe Ken; M/s Chung Chambers
For the defendants - Julie Ha; M/s Tiong & Assocs

Reported by Syamim Ariffin

JUDGMENT

Anand Ponnudurai J:

Introduction

[1] Order 57 of the Rules of Court 2012 (hereinafter referred to as "ROC 2012") is the relevant and applicable rule that is invoked by parties and relied upon when making an application to transfer proceedings from one court to another. Transfer applications are often made for a variety of reasons and this is one such case where a defendant had applied to transfer the proceedings from this court to the High Court of Kuala Lumpur. Such application was allowed and I will now provide the background facts and the reasons as to why this court allowed the transfer application.

The Background Facts/The Claim, Defence And Counterclaim

[2] The first plaintiff (P1) is a director and 51% shareholder in the second plaintiff company (P2). The first and second defendants (D1 and D2) are also directors of P2, who own 20% and 9% shares, respectively. The remaining 20% is held by one Poh Meng Cheong.

[3] The plaintiffs' pleaded case *vide* its statement of claim can be summarised as follows.

[4] P2 was established by the parties to sell food and drinks through a café called "BeAngels Specialty Coffee" ("BeAngels") in G-08, Island Plaza, Jalan Tanjung Tokong, 10470 Penang for which P1 was entrusted to find investors and financiers whereas D1 and D2 were responsible for the operations of the café (hereinafter referred to as "the Penang café").

[5] The plaintiffs' cause of action against D1 and D2 are, *inter alia* premised on allegations of conspiracy to injure P1 and P2 as P1 has discovered that D1 has incorporated a sole proprietorship "Lokal Bakery Resources" which in turn opened a café called "BeanGood" (hereinafter referred to as "the KL café") at No 27G, Jalan Damai Raya 6, Taman Alam Damai Circle, Cheras, Selangor, which had a similar business to that of the Penang café.

[6] In addition, the plaintiffs plead that the defendants had *inter alia* solicited the staff of the Penang café to work in the KL café and alleged that they had misappropriated trade secrets, misused social platforms for purposes of marketing BeanGood products, *etc*.

[7] The plaintiffs further plead that the defendants had breached their fiduciary duties as a director of P2 by establishing the KL café, its soliciting of staff and misappropriation of trade secrets.

[8] The plaintiffs also plead that the defendants had committed the tort of passing off as the cursive font used for BeanGood's logo is similar to BeAngels and the design and marketing style employed by Lokal Bakery Resources are identical to P2.

[9] Finally, at para. 28 of the statement of claim, the plaintiffs plead that this claim was filed pursuant to an *ex parte* order obtained in the Penang High Court for leave to commence this derivative action pursuant to ss. 347 and 348 of the Companies Act 2016.

[10] The defendants in their statement of defence have, *inter alia*, pleaded as follows:

(i) that they have not breached their fiduciary duties;

(ii) that the Penang café had closed down and was not doing well;

(iii) that P1 had treated the defendants in an oppressive manner;

(iv) that they deny any allegation of passing off; and

(v) they mount a counterclaim against P1 and one Lynette Tan Zhu Lyn, who is PT's daughter for conspiracy to injure D1 as well as minority oppression.

[11] Thereafter, D1 filed encl. 7, seeking to transfer this entire suit to the Kuala Lumpur High Court. The plaintiffs opposed encl. 7. Although encl. 7 was filed by D1, D2 supports such an application and is also of the view that the matter ought to be transferred to the Kuala Lumpur High Court.

[12] The court will now set out the contentions of both parties in respect of the transfer application and the court's reasons for having allowed encl. 7 and transferring the matter to the Kuala Lumpur High Court.

The Defendants' Contention In Support Of The Transfer

[13] The reasons and grounds advanced in support of the transfer application can be summarised as follows:

(i) that the cause of action against D1 arose in Kuala Lumpur;

(ii) that both defendants reside in Kuala Lumpur; and

(iii) that the *forum conveniens* is in favour of the defendants and it would avoid the defendants from incurring higher costs during the trial of this suit.

The Plaintiffs' Contention

[14] The plaintiffs, on the other hand, contend that Penang is the correct forum based on the following reasons:

(i) that the cause of action arose in Penang;

(ii) that the defendants' counterclaim is premised on alleged facts that occurred in Penang; and

(iii) that the *forum conveniens* is in Penang.

Analysis

The Applicable Law

[15] It is trite that O. 57 of the ROC 2012 governs the transfer of proceedings. In particular, in a transfer application, which relates from one High Court to another High Court of coordinate jurisdiction, O. 57 r. 1(4) of the ROC 2012 provides that the court shall take into consideration the following factors before making any order to transfer any proceedings:

(i) where the cause of action arose;

(ii) where the defendant, or one of the several defendants, resides or has his place of business;

(iii) where the facts on which the proceedings are based exist or are alleged to have occurred;

(iv) where the land the ownership of which is disputed is situated; or

(v) where, for other reasons, it is desirable in the interests of justice that the proceedings should be transferred.

[16] The above is to be read together with s. 23(1) of the Courts of Judicature Act 1964, which provides as follows:

> Civil jurisdiction-general
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> 23. (1) Subject to the limitations contained in Article 128 of the Constitution the High Court shall have jurisdiction to try all civil proceedings where:
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> (a) the cause of action arose;
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> (b) the defendant or one of several defendants resides or has his place of business;
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> (c) the facts on which the proceedings are based exist or are alleged to have occurred; or
>
> (d) any land the ownership of which is disputed is situated,

within the local jurisdiction of the Court and notwithstanding anything contained in this section in any case where all parties consent in writing within the local jurisdiction of the other High Court.

[17] Further, reference is made to the case of *POSC Tl Sdn Bhd v. Kerajaan Negeri Terengganu & Anor* [2015] CLJU 1416; [2015] 1 LNS 1416; [2016] 10 MLJ 663, where Mary Lim J (as she then was) held as follows:

[19] It is also evident from a proper reading of O. 57 r. 4, not any one factor will prevail over the other. The court is to weigh any or all the factors relied on in making a decision on whether the application ought to be acceded to.

[18] In addition, in the case of *Low Long Yoong & Anor v. Low Kok Choon & Anor* [2014] 4 CLJ 577; [2014] 2 MLJ 725, Nantha Balan JC (as he then was) enunciated as follows:

[45] In my view, the most important task in a transfer application is to ascertain which court has the closest nexus to the dispute. In *Sin Hai Estate Berhad v. Lim Jit Kim @ Lim Tian Jee* [2007] MLJU 3; [2003] 2 AMR 336 His Lordship Justice Abdul Malik Ishak (after examining all the factors) expressed it in the following manner:

> Everything seemed to have taken place in Malacca, Convenience would dictate that Malacca should be the right forum.

[46] Next, *Sova Sdn Bhd v. Kasih Sayang Realty Sdn Bhd* [1988] 2 MLJ 268 the late Mr Justice Lim Beng Choon's discussion on the power and jurisdiction of the court and the factors to be taken into account in determining the most convenient forum is relevant and I quote:

> ... a branch of the High Court located in any state has concurrent jurisdiction to entertain any civil proceedings; otherwise the mere consent of the parties given under section 23(1) of the 1964 Act that a civil suit be tried in a state other than the state where the four criteria are applicable would be otiose simply because if a court has no jurisdiction to deal with a matter no consent of the parties can confer jurisdiction on the court. For the above reasons I hold that this court certainly has jurisdiction to entertain the present civil proceedings notwithstanding that the four criteria stipulated in section 23(1) of the 1964 Act are not applicable. However, that is not the end of the matter since the defendants have also contended that this court is not the proper or convenient forum to determine the dispute between the parties. To this contention, I agree. It is quite obvious that in creating a branch of the High Court in Malaya in each state, the legislature had two things in mind:
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> > (i) to enable the parties of a civil suit to have easy access to a branch of the High Court in Malaya located in a state where either the plaintiff or the defendant resides. When a person is sued for breach of contract or for that matter a tortious act when the breach or the tort was committed in the state where

A he resides, it is certainly unreasonable to require him to travel all the way, say, to Kuala Lumpur to defend himself. Apart from the expense incurred, the defendant may have to remain in Kuala Lumpur perhaps one week to participate in the civil proceedings. No doubt he would be compensated in terms of costs should he succeed in defending himself but the
B inconvenience caused may outweigh the amount of costs awarded to him;

(ii) the obvious reason for the setting up of a branch of the High Court in Malaya in every one of the 11 states is to facilitate the disposal of cases in Malaya and to cut down, even
C if it is not yet possible to obliterate, the backlog of cases pending in anyone or more of the branches of such High Court.

[19] I had occasion in the case of *Ahmad Amryn Abd Malek & Ors v. Bursa Malaysia Securities Bhd* [2021] 2 CLJ 222; [2021] 1 MLRH 69 to consider the
D relevant factors when determining a transfer application whereby I had held as follows:

[12] When determining whether an order should be made pursuant to subparagraph (E) of O. 57 r. 1(4)(d) of the ROC 2012, the Court has a rather wide discretion to determine whether the reasons put forth by the
E applicant is fit and appropriate to achieve the end purpose of ensuring that the interest of justice is served. The court must also be satisfied that the matter, if transferred, can be "more conveniently or fairly tried" by the said Court. This was espoused by Mohd Radzi Harun JC in the case of *Mohd Anuar Hemdi & Anor v. Raz Intan Development Sdn Bhd & Ors* [2019] MLRHU 191 HC, when disallowing an application for a transfer of
F proceedings from the Sessions Court to the High Court.

[13] It must be emphasised that the burden lies on the plaintiffs to satisfy the court that the transfer of proceedings would ensure that the OS Action is more conveniently or fairly tried in order to achieve the end purpose of serving the interest of justice.

G **[20]** It is also trite that the burden of proof is on D1 as the applicant to satisfy this court that the matter can be more conveniently tried in Kuala Lumpur High Court. In the case of *Tenaga Nasional Bhd v. Advanced Medical Products Sdn Bhd* [2018] CLJU 884; [2018] 1 LNS 884; [2018] MLRHU 730, His Lordship, Anselm Charles Fernandis JC (as he then was) held as follows:

H [27] The grounds for consideration in assessing the forum which is convenient or fair are set out under the Courts of Judicature Act 1964 (Act 91), s. 23(1) and the burden is on the applicant to satisfy the court why the transfer to another court would be more convenient, appropriate and fair for the trial of the case. In this respect, the balance would tilt in
I favour of the party which is able to satisfy more of the criteria set out under s. 23(1) CJA and O. 57: see *Tan Hoo Eng & 2 Ors v. Lim Keck Eng & 6 Ors* [2014] MLRHU 921; [2014] 9 CLJ 992.

[21] Having set out the above, I will now proceed to apply the same to the facts of the case. First and foremost, it cannot be disputed that both the defendants reside and have a place of business in Selangor or Kuala Lumpur. As held in the cases of *Chow Siew Hon v. Lee Tian Hock & Anor* [2016] CLJU 662; [2016] 1 LNS 662; [2016] MLJU 1469 and *Ops Suria (EM) Sdn Bhd v. Ayuda Engineering Services Enterprise Sdn Bhd* [2012] 4 CLJ 670; [2012] 9 MLJ 159, *prima facie*, the residence of the defendants is a factor to be taken into account and the defendants should not be required to travel to defend itself. Whilst this is an important factor to consider, I have also to bear in mind that the defendants in the counterclaim are situated in Penang. As such, this court will also proceed to consider where the cause of action arose or the facts on which the proceedings are based exist or are alleged to have occurred.

[22] In this regard, it appears that there are certainly facts occurring in both Penang and Kuala Lumpur and it may ultimately boil down to a situation where this court has to decide which court would be more convenient, appropriate and fair for the trial of the case and/or whether it will be desirable in the interest of justice that the proceedings be transferred to the Kuala Lumpur High Court.

[23] In my view, the starting point must be the original statement of claim filed by the plaintiff. In my opinion, that should be the predominant cause of action that ought to be considered for the transfer application, as the counterclaim is merely one that is then brought in response to the statement of claim.

[24] Reverting then to the statement of claim. As highlighted earlier, the plaintiffs' claim centres around the defendants setting up a rival business in Kuala Lumpur, poaching staff to work there and committing the tort of passing off in the establishment of BeanGood.

[25] The allegations of misappropriation of trade secrets and property belonging to D2, in my view, were all in relation to the establishment of BeanGood in Kuala Lumpur.

[26] In my opinion, there is certainly merit in the defendants' submission that the predominant cause of action arose or occurred in Kuala Lumpur as the plaintiffs contend as follows:

(i) that the defendants had wrongfully established the Lokal Bakery Resources located at Kuala Lumpur and improperly opened BeanGood at No 27G, Jalan Damai Raya 6, Alam Damai, 56000 Cheras, Federal Territory of Kuala Lumpur, having the same nature of business with the BeAngel owned by P2 and creating direct competition;

(ii) that the defendants had procured capital contribution from P2's shareholders, persuaded and invited employees and the main chef, namely, Poh Meng Cheong, from the café to join and invest in Local Bakery Resources and to work in BeanGood, which are both located in Kuala Lumpur;

(iii) that the defendants had committed the tort of passing off as the cursive font used for BeanGood's logo is similar to BeAngels and the design and marketing style employed by Lokal Bakery Resources are identical to P2;

(iv) misappropriation of trade secrets/information obtained from experience and business documents of P2 for personal gain and unjust enrichment through the development of the brand BeanGood;

(v) misappropriation of property belonging to P2 by transporting and using the same at BeanGood with the address of No. 27G, Jalan Damai Raya 6, Alam Damai, 56000 Cheras, Federal Territory of Kuala Lumpur and Lalaport, Bukit Bintang City Centre Kuala Lumpur.

[27] The plaintiffs on the other hand, contend that since the cause of action is premised on the conduct of the defendants allegedly in breach of fiduciary duty of P2, the matter should be heard in Penang as P2 is situated in Penang. With respect, I disagree with the plaintiffs' contention. In my view, whilst the plaintiffs may indeed contend that the breach of fiduciary duty in essence injured P2 in Penang, the cause of action is predominantly based on the defendants' conduct in opening the café in Kuala Lumpur, *etc*.

[28] Additionally, another factor which the plaintiffs heavily rely on is the fact that leave to file this action under ss. 347 and 348 of the Companies Act 2016 was granted by His Lordship Justice Quay Chew Soon in the Penang High Court on 12 January 2024 *vide* OS No PA-24NCC-43-12/2023. It is thus contended by the plaintiffs that as the leave was granted by the Penang High Court, this clearly meant that the Penang High Court is cloaked with the territorial jurisdiction and/or the Penang High Court is the proper forum to hear this case. With respect, I disagree.

[29] First and foremost, I was startled to discover that the defendants have affirmed in their affidavits that they were totally unaware of the prior leave application. It was thereafter discovered that the plaintiffs herein had obtained the leave order on 12 January 2024 on an *ex parte* basis without serving the same on the defendants.

[30] In my view, leave applications for derivative actions are heard *inter partes* and normally heavily contested and I am not sure how the plaintiffs managed to obtain such an order on an *ex parte* basis. However, as the leave order has not been set aside to date, it is still valid but I will leave the issue of the validity of the said leave order for now. However, the fact that it was obtained *ex parte* cannot in my view be relied upon to now contend that the Penang High Court is cloaked with the jurisdiction to hear the suit.

[31] The plaintiffs then also contend that the subject matter of these proceedings relates to the BeAngles in Penang, which they state is the starting point of the defendants' misconduct. Whilst the plaintiffs contend that BeAngels and/or P2 have suffered injury as a result of the defendants' alleged misconduct, in my view, the crux of the complaint and the cause of action relates to the defendants' action of setting up Lokal Bakery Resources and BeanGood in Kuala Lumpur and allegedly poaching staffs and utilising the utensils in Kuala Lumpur.

[32] In my further opinion, one critical aspect of this case relates to the allegation of passing off by BeanGood. This alleged passing off can only be without doubt committed in Kuala Lumpur with the allegation of BeanGood using the logos of BeAngels *etc*, and this is another reason why this matter ought to be transferred to the Kuala Lumpur High Court, which has a specialised intellectual property court.

[33] The plaintiffs draw the court's attention to the fact that the defendants' counterclaim is premised on facts that occurred in Penang and that the three defendants in the counterclaim reside in Penang. As indicated earlier, whilst the counterclaim does involve the defendants that reside in Penang, the court is primarily guided by the facts, allegations and pleadings in the original claim.

[34] Finally, still on the issue of the counterclaim, in my view, the mere fact of the filing of such counterclaim cannot be tantamount to the defendants agreeing to or submitting to the jurisdiction of the Penang High Court. See the case of *Vincent Danial lwn. Rani M Doraisamy* [2009] CLJU 961; [2009] 1 LNS 961; [2010] 7 MLJ 116.

Conclusion

[35] In the upshot, quite apart from the fact that the defendants reside or have the place of business in Kuala Lumpur, having considered all matters and for the reasons stated hereinabove, this court is of the view that the Kuala Lumpur High Court would be the more convenient, appropriate and fair for the trial of this case. In my opinion, the defendants have satisfied the burden of proving that it is desirable in the interest of justice that these proceedings be transferred to the Kuala Lumpur High Court.

[36] As such, encl. 7 is allowed with costs in the cause.